

EXHIBIT M

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2 IN THE MATTER OF AN ARBITRATION UNDER
THE UNCITRAL ARBITRATION RULES BETWEEN

3 -----

4 TELENO^R MOBILE

COMMUNICATIONS, AS,

5

6 Claimant, VOLUME III

7 vs. TRANSCRIPT OF

8 PROCEEDINGS

9 STORM, LLC,

10 Respondent.

11 -----

12

13 Transcript of the stenographic notes of the
14 proceedings in the above-entitled matter, as taken by
15 and before BONNIE ATELLA PRUSZYNSKI, a Certified
16 Shorthand Reporter and Notary Public, held at the
17 offices of Lovells, Esqs., 590 Madison Avenue, New
18 York, New York, on Tuesday, September 5, 2006,
19 commencing at 9:30 a.m.

20

21 BEFORE:

22 KENNETH R. FEINBERG, CHAIRMAN

23 WILLIAM R. JENTES, ARBITRATOR

24 GREGORY B. CRAIG, ARBITRATOR

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2
3 APPEARANCES:
4 ORRICK, HERRINGTON & SUTCLIFFE, LLP
666 Fifth Avenue
5 New York, New York 10103-0001
(212) 506-5110
6 BY: ROBERT L. SILLS, ESQ.
-and-
7 ADAM S. ZIMMERMAN, ESQ.
8 -and-
9 ORRICK, HERRINGTON & SUTCLIFFE, LLP
Tower 42, Level 35
10 25 Old Broad Street
London, EC2N 1 HQ
11 DX: 557 London/City
BY: PETER O'DRISCOLL, ESQ.
12 Attorneys for Claimant
13
14 LOVELLS, ESQS.
590 Madison Avenue
15 New York, New York 10002
BY: PIETER VAN TOL, ESQ.
16 -and-
ERIC Z. CHANG, ESQ.
17 -and-
LISA J. FRIED, ESQ.
18 Attorneys for Respondent
19
20 ALSO PRESENT:
21
22 BJORN HOGSTAD, ESQ., Telenor
23
24 OLEKSIY V. DIDKOVSKIY, Partner
Shevchenko Didkovskiy & Partners
25

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2 JAY K. MUSOFF, Partner, Orrick
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4 CHAIRMAN FEINBERG: Good morning,
5 everybody.
6 We are here from far flung locations
7 to reconvene on this arbitration on the
8 Motion to Dismiss. And in light of the
9 arbitration panel's ruling concerning
10 schedule, we are here today to hear from
11 Storm, initially on whatever it wants to add
12 to the record on the subject of the
13 affidavit of David Wack and, as long as we
14 have reconvened, on any other matters or
15 loose ends or other issues that Storm and
16 its counsel wish to raise.
17 After you conclude, we will ask
18 Telenor, A, if they have any response today
19 to the affidavit of David Wack or any other
20 related matters. By the panel's recent
21 order, we have given Telenor until the close
22 of business on September 8, if it wishes to
23 supplement the record in any manner on this
24 pending motion, before we close the record
25 on this motion and proceed to decide the

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2 motion as a panel.
3 The second item we wish to cover
4 today, once we conclude argument on the
5 evidence offered by Storm, is to discuss on
6 the record the question of a hearing date
7 and any prehearing discovery.
8 And with that summary of the state of
9 play, I call on Storm and its distinguished
10 counsel to add anything that it wishes to
11 add concerning the affidavit of Wack or
12 other matters.
13 Pieter?
14 MR. VAN TOL: Thank you, Mr. Chairman.
15 With the tribunal's indulgence, what I
16 would like to do is pick up on what I think
17 you referred to as some loose ends from the
18 last hearing and then go to the affidavits.
19 But, of course, I am happy to deal with any
20 questions that come along as they come up.
21 At the last hearing, we focused very
22 much on the issue of apparent authority, and
23 the question of whether Telenor Mobile knew
24 or should have known that there were
25 limitations on Mr. Nilov's authority.

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2 I won't rehearse, again, our
3 arguments. You know what they are. It's
4 that Telenor Mobile was in possession of
5 Storm's charter. It knew from the 2002
6 transactions that an authorization was
7 needed for any transaction involving the
8 disposition of Kyivstar shares. Since the
9 2004 shareholders' agreement was the same in
10 that respect, it's our position that Telenor
11 Mobile knew or should have known that
12 another authorization was needed.

13 Now, in response to that, Storm has
14 claimed -- sorry, Telenor Mobile has claimed
15 that Storm is essentially estopped from
16 arguing that Mr. Nilov lacked authority or
17 that Storm, through its actions, somehow
18 ratified the 2004 shareholders' agreement.

19 I will deal with each of those in
20 turn.

21 First, with regard to what we will
22 loosely call estoppel. I noted from the
23 tribunal's questions last time that you are
24 somewhat troubled by the notion that Storm
25 could argue that Telenor Mobile knew or

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 2 should have known of the limitations, while
 3 at the same time you queried whether Storm
 4 had the same information in its possession
 5 and shouldn't it have known or been aware
 6 that Mr. Nilov needed authority.

7 What I would like to do is reorient us
 8 on the law. The key prong of estoppel
 9 that's involved here is reasonable reliance,
 10 and that question only looks at the
 11 knowledge of the party raising the estoppel
 12 argument, which is Telenor Mobile.

13 It's essentially the same question
 14 that is raised by apparent authority. What
 15 did Telenor Mobile know?

16 Now, estoppel theory adds another
 17 layer, which is: Was it reasonable for
 18 Telenor Mobile to rely on Mr. Nilov's
 19 apparent authority in light of what it knew?
 20 And we submit that the answer is a no, for
 21 the reasons I have just articulated.

22 So, really, Storm's knowledge for
 23 purposes of the legal analysis, is not
 24 relevant here.

25 Now, I think it's clear from what we

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 2 have seen so far, particularly the new
 3 affidavits, that the main participants for
 4 Storm in 2004 were simply unaware that there
 5 was a need for another authorization from
 6 the meeting of participants. No one has
 7 suggested that they knew and somehow didn't
 8 want to get one.

9 It looks like, from what we know, that
 10 Mr. Khudyakov, and other people involved,
 11 simply didn't know until later that there
 12 needed to be a meeting of participants.
 13 That doesn't change the fact that such an
 14 authorization was needed, as the courts have
 15 found and as our expert, Mr. Maydanyk, has
 16 shown in his legal opinion.

17 I want to pause here and emphasize
 18 here why, though, Storm is even talking
 19 about this evidence. Because our view has
 20 been and still is that Sphere Drake does not
 21 require a searching analysis of the merits
 22 of each party's argument on estoppel or
 23 ratification, et cetera. All it requires by
 24 Storm is that Storm show there is some
 25 evidence that no contact was formed.

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 2 So, I don't have to, today, show you
 3 that Telenor Mobile's theory of estoppel is
 4 wrong. I also don't have to show you today
 5 or later that their ratification theory is
 6 wrong.

7 What Sphere Drake requires me to do is
 8 show that I have some evidence for saying
 9 Telenor Mobile's counterarguments are
 10 deficient. So long as I can do that, the
 11 issues of estoppel, ratification and
 12 anything else we can think of, need to be
 13 decided by a court.

14 And I note that if Telenor Mobile is
 15 arguing, again, how terribly unfair it all
 16 is, well, they had the opportunity to go the
 17 Ukraine courts. We have been over this, and
 18 I haven't heard yet an articulation from
 19 Telenor Mobile other than we are not sure
 20 Ukrainian courts are the best place to be.
 21 And then at the last hearing Mr. Sills
 22 mentioned that Telenor Mobile could be bound
 23 by the appellate record as it is in the
 24 Ukraine.

25 Well, we have seen, from the goings on

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 2 relating to the December 22 order, that
 3 that's not the case. Telenor Mobile has
 4 gone back and introduced new evidence in
 5 connection with that proceeding. As far as
 6 I'm aware, they can do the same with respect
 7 to our case. They have submitted no expert
 8 opinion saying that they are bound by the
 9 record, and that's a pretty thin reed to
 10 rely upon if you are going to say I'm going
 11 to ignore, basically, or ask the tribunal to
 12 disregard what's happened in Ukraine.

13 Now, I will turn briefly to
 14 ratification, because it's in many ways
 15 related to estoppel and can be dealt with
 16 fairly quickly.

17 Telenor Mobile, as a party arguing for
 18 ratification, has to show that Storm, first
 19 of all, knew that Mr. Nilov lacked
 20 authority; and, two, that it failed to
 21 repudiate the agreement in a timely manner.

22 Now, I take it from the last hearing
 23 that what Telenor Mobile is saying is that
 24 the events of 2004, the amendment to the
 25 charter and other events, show that there

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 2 was ratification of the 2004 shareholders'
 3 agreement. But at the time of those events
 4 in 2004, Storm was not aware that Mr. Nilov
 5 had acted outside his authority. It was
 6 only after Alpha's purchase of the remaining
 7 shares in Storm through Alperin in the fall
 8 of 2004, that Alpha obtained all the records
 9 for Storm and realized something was amiss.
 10 As I understand it, the transaction went
 11 through sometime in the fall of 2004, and it
 12 wasn't during the due diligence period, but
 13 it was after all the records had been
 14 assembled that, sometime in 2005, likely
 15 early 2005, Alpha/Storm realized that
 16 Mr. Nilov had signed the 2004 agreement
 17 without authority.

18 And remember, it's not as if it's been
 19 from early 2005 until April 2006, when Storm
 20 first raises the issue of corporate
 21 governance. We have been arguing since
 22 March of 2005, as Mr. Sills has wanted to
 23 point out, that there are many issues about
 24 corporate governance relating to Kyivstar.
 25 Our representatives stopped attending

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 2 corporate meetings. It's not as if Storm
 3 has pretended, since January 2004, that the
 4 shareholders' agreement is a good and extant
 5 agreement.

6 To the contrary, as soon as Alpha
 7 realized something was amiss, it started
 8 attacking the corporate governance issues
 9 any way it could. And this ultra virus
 10 argument is just the last, I hope, in a
 11 series of attacks on the same issues.

12 That's all I want to say on apparent
 13 authority. And I am about to move on to the
 14 standard, the Sphere Drake cases, that
 15 Mr. Jentes raised last time.

16 If the tribunal has any questions now
 17 on apparent authority, I am happy to take
 18 them; if not, I will move on to the legal
 19 standard.

20 CHAIRMAN FEINBERG: Go ahead.
 21 MR. VAN TOL: Okay. At the last
 22 hearing, Mr. Sills brought up the case
 23 called Shaw in the Second Circuit. And I
 24 believe this has been distinguished already,
 25 but I just want to make sure we nail this.

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 2 Shaw does not go to the same issue
 3 that is before the tribunal or is involved
 4 in this case. It did not go to the question
 5 of whether a contract was formed. It went
 6 to the issue of whether, I believe it was
 7 attorneys' fees, or whether a party was
 8 entitled to attorneys' fees, was an
 9 arbitrable issues.

10 Telenor Mobile has not cited any case
 11 and I am unaware of any case, where the
 12 courts have said if you have an arbitration
 13 agreement, and you cite the Uncitral rules,
 14 and you have a severability provision, and a
 15 party like Storm argues that there is no
 16 contract, that an arbitration tribunal may
 17 find that there is a separate agreement to
 18 arbitrate, and it may go ahead and decide
 19 the issue of contract formation. There is
 20 no authority that has been given to you for
 21 that proposition. Shaw doesn't stand for it
 22 and Sphere Drake in the Seventh Circuit
 23 actually supports the Sphere Drake in the
 24 Second Circuit case, which I thought we had
 25 all agreed was the standard. And that

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 2 standard is: Where a party says no contact
 3 was formed, and it comes up with some
 4 evidence to back that up, the issue of
 5 contract formation is decided by someone
 6 other a tribunal.

7 Now, moving on to some of the things
 8 that were raised in the affidavits. One
 9 point quickly, and I want to make sure this
 10 came through in the David Wack affidavit, at
 11 the last hearing, I believe it was Exhibit K
 12 to the -- and I apologize for mispronouncing
 13 his name -- to the Lykke affidavit, there
 14 was a series of e-mails from Mr. Wack that
 15 talked about whether or not Mr. Nilov could
 16 sign the agreement himself or whether there
 17 needed to be a signature for a chief
 18 accountant at Storm.

19 Telenor Mobile has tried to make a lot
 20 of those e-mails, even suggesting that
 21 Mr. Wack was saying there that Mr. Nilov had
 22 authority for all time to bind Storm to any
 23 agreement, the 2002 voting agreement and the
 24 2004 shareholders' agreement. Mr. Wack has
 25 told in his affidavit that he had a much

<p style="text-align: right;">Page 14</p> <p>1 Proceedings 2 more limited purpose in his e-mails, which 3 was simply to tell Telenor Mobile that it 4 was his understanding that Mr. Nilov could 5 sign as the general director. 6 Now, what that obviously assumes is 7 that Mr. Nilov has authority to act and 8 that, in turn, derives from the meeting of 9 participants. 10 If you look at the e-mail chain in 11 Exhibit K, this is from August of 2002. 12 Clearly, between August 2002 and 13 October 2002, someone advised the parties 14 that there needed to be meeting of 15 participants because there was one to give 16 Mr. Nilov authority. 17 And it's our understanding that, for 18 the 2002 transaction, Storm had separate 19 Ukrainian counsel that did not participate 20 in the 2004 transaction. Mr. Wack and 21 Mr. Hudyakov go to great pains to tell the 22 tribunal that Mr. Wack is not a Ukrainian 23 law expert, he's a transactional lawyer. 24 Any advice he's giving is merely passing on 25 his understanding from Ukrainian counsel</p>	<p style="text-align: right;">Page 15</p> <p>1 Proceedings 2 and, in 2004, he was not imparting Ukrainian 3 law advice to Mr. Hudyakov. It appears that 4 Storm either did not have separate Ukrainian 5 counsel in 2004, or is relying on 6 Mr. Jamack, as the representative of the 7 Kyivstar, to protect its interests on 8 Ukrainian law. As I said earlier, this 9 looks like a mistake; that's what ultra 10 virus cases are about. 11 Now, just quickly, I would like to 12 point out a few more things from the Wack 13 affidavit and then move on briefly to the 14 other affidavits with the understanding that 15 the tribunal will rule on whether or not 16 it's going to accept those affidavits, given 17 that the original ruling was for us to 18 submit something from Mr. Wack. 19 In the Wack affidavit, Mr. Wack 20 recounts for the tribunal that the 21 understanding of the parties in 2002 was 22 that there -- there were conditions 23 precedent to moving forward with the 24 shareholders agreement, namely that the 25 Omega transaction go through. I think that</p>
<p style="text-align: right;">Page 16</p> <p>1 Proceedings 2 is common ground now based on the Ekhougen 3 testimony. He also testified that, looking 4 at the changes to the termination 5 provisions, that those were material and 6 substantial changes. 7 And as I said a moment ago, when he 8 was contacted by Mr. Khudyakov in January of 9 2004, what he was giving advice on was the 10 provisions of the material breach amendment. 11 He was not opining on Ukrainian law. And it 12 appears that the need for another 13 authorization for the meeting of 14 participants somehow slipped through the 15 cracks. 16 Now, moving on to what Mr. Hudyakov 17 says, I think he fills in nicely a question 18 that was outstanding from the last hearing, 19 which is: Why is it that Storm wanted these 20 changes to the breach, the material breach 21 provisions? 22 And he tells you in plain terms that 23 the Ukrainian partners of Storm at that time 24 did not have a good relationship with 25 Telenor Mobile. They didn't trust Telenor</p>	<p style="text-align: right;">Page 17</p> <p>1 Proceedings 2 Mobile. In fact, they used Mr. Hudyakov as 3 their intermediary to talk to Telenor 4 Mobile. And what they wanted those 5 provisions for was for security to make sure 6 that Telenor Mobile abided by its 7 obligations. 8 Now, moving on, we also submitted the 9 affidavit from Mr. Kosogov, who I think 10 makes it plain that when he submitted the 11 Certificate of Incumbency in January of 12 2004, at the request of Telenor Mobile, the 13 one thing he was not saying is that there 14 was a meeting of participants in either 15 December 2003 or January 2004. 16 He has no information that there was 17 such a meeting, which is consistent with 18 what Mr. Wack says, with what Mr. Klymenko 19 has said, with what every witness we ever 20 has talked to has said. 21 What Mr. Kosogov was doing with the 22 Certificate of Incumbency was relying on his 23 knowledge of a general director's overall 24 ability to act. 25 Moving on, we have the affidavit from</p>

<p style="text-align: right;">Page 18</p> <p>1 Proceedings 2 Mr. Ilyashev from Alperin, really saying 3 that if you want see what arguments Alperin 4 made, look at the statement that was 5 submitted to the Ukrainian courts. But 6 there is a very interesting point that was 7 raised about arbitration, and whether the 8 Ukrainian court was aware of the proceedings 9 going on in New York. I think it's clear 10 now, based on the Klymenko affidavit and 11 Ilyashev affidavit, that the Ukrainian court 12 was advised of the New York proceedings and 13 that Alperin argued that Alperin was not a 14 party to these proceedings. It had his own 15 free-standing claim and they ought to be 16 able to move forward in the Ukraine and 17 that's exactly what the Court found.</p> <p>18 Finally, we have the Maydanyk 19 affidavit, and I will not go through that in 20 detail, because it's voluminous, and I am 21 sure the tribunal will have an opportunity 22 to consider it. But the main point of that 23 affidavit, and the reason we submitted it, 24 is to show you that the decisions of the 25 Ukrainian courts are not some outlier</p>	<p style="text-align: right;">Page 19</p> <p>1 Proceedings 2 decision that you can disregard for whatever 3 reason. The Ukrainian courts had a good 4 reason in coming to their conclusion, it is 5 supported by Ukrainian law, and at a 6 minimum, what the Maydanyk affidavit shows 7 is that Ukrainian law is not straightforward 8 on this point, it's complex, but there is 9 evidence to support Storm's arguments. 10 And if it were really the case that 11 Telenor Mobile had these great arguments 12 about apparent authority, when it incepted 13 and when that concept came into Ukrainian 14 law, I would submit that they should have 15 gone to the Ukrainian courts, as I have said 16 many times, and gotten those issues hashed 17 out there. 18 That's all I wanted to bring out for 19 the tribunal's benefit this morning, of 20 course, subject to anything that Mr. Sills 21 raises or any questions that you may have. 22 CHAIRMAN FEINBERG: Mr. Sills. 23 MR. SILLS: Thank you, Mr. Chairman. 24 Let me turn, first, to tell the claim 25 about Sphere Drake and the lack of the</p>
<p style="text-align: right;">Page 20</p> <p>1 Proceedings 2 authority. 3 The Second Circuit's decision in 4 Sphere Drake does not say and cannot be made 5 to say that a party opposing arbitration has 6 to come up with a scintilla of evidence in 7 order to defeat the arbitration agreement it 8 made. 9 What Sphere Drake says is that, on a 10 motion to compel arbitration, it will be 11 treated as motion for summary judgment, and 12 if the party opposing arbitration can 13 produce enough evidence to overcome a prima 14 facie showing, then there will be a hearing, 15 an evidentiary hearing, on the question of 16 whether or not there is or is not going to 17 be an arbitration. 18 And I don't want to take up everyone's 19 time, but Sphere Drake repeatedly says 20 that that is the showing that has to be 21 made, not to defeat arbitration, but in 22 order obtain a full blown evidentiary 23 hearing on the question of whether or not 24 there will be an arbitration. 25 We have had that hearing, and now we</p>	<p style="text-align: right;">Page 21</p> <p>1 Proceedings 2 are having it for a second time, and there 3 isn't any evidence sufficient to defeat the 4 showing that Storm should be held to the 5 agreement it made. 6 Now, as to the claim what was just 7 quoted, that this panel lacks jurisdiction, 8 and this ought to be heard in court, I count 9 five places in the last transcript where 10 this panel's jurisdiction was conceded. The 11 first is at page 258, lines nine through 13. 12 You said, Mr. Feinberg, quote, you 13 have just said on the record that you are 14 not here challenging this tribunal's ability 15 to determine jurisdiction? 16 And Mr. Van Tol responded: Correct. 17 The second is the following page, at 18 page 259, lines eight and nine, where 19 Mr. Van toll said, quote, I am saying you 20 have the power -- there appears to be 21 slightly garbled. I am saying you have to 22 the power to determine your jurisdiction. 23 At page 260, again Mr. Van Tol said, 24 quote, we say you have the power to 25 determine your jurisdiction, that is</p>

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 2 informed by Sphere Drake. That appears at
 3 lines 15 through 18.

4 A little while later in the hearing
 5 Mr. Jentes said, what, exactly, do you mean,
 6 we have jurisdiction?

7 And Mr. Van Tol responded as follows:
 8 it's within your power under the Uncitral
 9 rules. You do have the power to determine
 10 whether or not this case should go forward;
 11 in other words, you have the power to
 12 determine whether or not there was a
 13 contract.

14 Again, at pages 266 and 267, Mr. Van
 15 Tol said: This clause, the Uncitral clause,
 16 does not prohibit Telenor Mobile from
 17 proceeding, going to the Ukrainian court.
 18 It says you may determine your jurisdiction.

19 That's what Sphere Drake says. That
 20 was Storm's position at the last hearing.
 21 They were right then; they are wrong now.

22 The Uncitral clause is clear. The
 23 contract is clear. I had extended colloquy
 24 with Mr. Jentes at the last hearing
 25 concerning Judge Easterbrook's Seventh

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 2 Circuit decision in Sphere Drake, which
 3 makes it clear that parties can opt out of
 4 the usual rule that these matters are to be
 5 determined in court and expressly provide
 6 for determination before an arbitration
 7 tribunal and that is expressly what they did
 8 here. It's what they did by adopting the
 9 Uncitral rules in their entirety. They are
 10 incorporated by reference into this contract
 11 as surely as if they had been set out word
 12 for word.

13 I think this was gone into at great
 14 length last time. I don't think there can
 15 be any serious argument that this tribunal
 16 has the jurisdiction to determine its own
 17 jurisdiction.

18 As to the question of apparent
 19 authority that has been raised, the
 20 presentation that was made, in effect,
 21 stands the doctrine of apparent authority on
 22 its head. The whole reason for the doctrine
 23 of apparent authority under New York law,
 24 which, after all, governs here, is that one
 25 party doesn't act at its peril in dealing

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 2 with a corporation. If a corporation
 3 creates all the indicia of authority,
 4 whether or not it's followed its internal
 5 procedures becomes irrelevant.

6 Now, the affidavits -- and there is no
 7 particular burden on a party that has been
 8 assured, both formally and informally, that
 9 there is due authorization and there is
 10 authority, to sort of drill down and
 11 challenge that. The test is actual
 12 authority.

13 So, looking at these affidavits that
 14 have been submitted, we could have submitted
 15 these affidavits, because they actually lend
 16 substantial support to Telenor's case.

17 Mr. Wack doesn't really address the
 18 question of actual or apparent authority; in
 19 effect, he's running away from his own
 20 transaction saying he had very limited
 21 involvement.

22 I will note that the claim now that he
 23 didn't mean to say that Mr. Nilov could act
 24 without a power of attorney, that it was in
 25 some other context, just doesn't ring true.

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 2 When you look at the words of the e-mail he
 3 sent, it's true he was addressing the
 4 question of do we need two signatures or one
 5 signature, because it's common, as I
 6 understand it, in east European legal
 7 systems for certain contracts to require two
 8 signatures. But he didn't say one signature
 9 is enough. He said the only officer is
 10 Nilov. Nilov can act without a power of
 11 attorney.

12 Now, I don't understand how you could
 13 twist words, can act without a power of
 14 attorney, into saying only one signature is
 15 required. I know what the words say. I
 16 understand now why he's trying to run away
 17 from them, but I think the document speaks
 18 for itself.

19 The only other point he makes is to
 20 weakly endorse this claim that was floated
 21 at the last hearing that the 2004
 22 shareholders' agreement was in some sense an
 23 agreement to agree. It's not. It was
 24 negotiated, it was annexed to the voting
 25 agreement, and the voting agreement has an

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2 automatic three-day trigger.

3 Once Storm, that is Alpha, succeeds in
4 buying the Omega shares, one it succeeds in
5 getting the blocking position that Telenor
6 agreed it could have by getting over the
7 40 percent limit, there would be an
8 automatic obligation to negotiate -- not
9 limit, excuse me, to sign the new
10 shareholders' agreement.

11 It is true that there were provisions
12 inserted at the request of Storm on
13 termination. But there they are estopped
14 and they can't profit from their own wrong.
15 Having requested, over Telenor's objection,
16 that the termination provisions be modified,
17 and Telenor having agreed to that, and then
18 having gone forward and signed the
19 agreement, they can hardly be said now, as a
20 matter of equity and good conscience, to set
21 up their own request as a basis for walking
22 away from their own agreement.

23 And there is certain irony here, since
24 they now claim they weren't aware of the
25 2002 meeting that expressly authorized the

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2 contract to be signed. It's a little
3 unclear how they could have had this
4 materiality argument that they have invented
5 in mind, when they claim now not to be aware
6 in 2002 that they had agreed to sign the
7 shareholders' agreement.

8 And on that point, with respect to
9 this Maydanyk legal opinion, I think it's
10 described as, which I think is really
11 nothing more than an unauthorized reply
12 brief. He argues that any change, however
13 slight or however formal, in his view
14 required a new meeting. Well, that proves
15 far too much.

16 Plus, I don't think it could seriously
17 be argued that if the parties had simply
18 executed the 2002 draft in 2004, in keeping
19 with the express authorization, both by
20 written polling and by a meeting in 2002,
21 that there was lack of actual authority.
22 But that seems to be the current position that
23 is being asserted, though it was not the
24 position that was asserted at the last
25 hearing.

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2 The other thing that jumps off the
3 page with Mr. Wack's affidavit, he says in
4 paragraph ten, I do not recall a meeting of
5 participants of Storm shareholders taking
6 place in late December 2003 and early
7 January 2004. And that's the same kind of
8 careful wording we see in all of these
9 affidavits. No one has said there was no
10 meeting.

11 We don't have control over Storm's
12 records. Each one of these affidavits says
13 something like I'm unaware, I don't know.
14 And here I think it's significant, not only
15 what's been submitted, but what hasn't been
16 submitted. It's another case of the dog
17 that didn't bark.

18 We are here because we were told that
19 Mr. Nilov was a critical witness, and his
20 testimony needed to be obtained, and that it
21 was more likely that his testimony could be
22 obtained than Mr. Wack's.

23 Well, Mr. Nilov was there. He's the
24 one that signed this document. He is an
25 employee of the Alpha Group. He is a senior

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2 officer of Alpha in charge of an entity
3 called Alpha Capital, which is headquartered
4 in Kiev. It's a matter of public record.
5 It's available on the internet. He is a
6 controlled witness.

7 And despite the proceedings having
8 been held over so Mr. Nilov's testimony
9 could be obtained, despite the fact that one
10 would think that as a senior executive of
11 the group that is making this claim, he
12 would be willing to testify if he had
13 favorable testimony to offer, at the end of
14 the day, we have nothing from Mr. Nilov.

15 And that raises, as a matter of New
16 York law and as matter of common sense, the
17 presumption that were he to testify, his
18 testimony would be unfavorable. Presumably
19 unfavorable because Mr. Nilov knew he had
20 authority to sign the agreement he signed.

21 When I turn to Mr. Khudyakov's
22 affidavit, Mr. Khudyakov does say -- and I
23 apologize because it's a little hard to read
24 the fax that we received. He says he has
25 recently been informed that these material

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 2 changes required a new authorization by
 3 Storm's meeting of participants. I wish to
 4 mention that at the time I did not ask for
 5 Mr. Wack's advice on this point.

6 Well, what Mr. Khudyakov said, his
 7 last word in the transaction -- can I have a
 8 copy his last e-mail, please?

9 And this is already in the record as
 10 Exhibit X to our evidentiary brief. And it
 11 says this: He's writing to Alexi
 12 Didkovskiy, the Ukrainian attorney for
 13 Telenor. "Storm reviewed the language of
 14 the new shareholders' agreement that you
 15 distributed yesterday and agreed to it. We
 16 are ready to sign it tomorrow. Please make
 17 the practical arrangements for the signing
 18 at Telenor (Ekhougen) and Kyivstar
 19 (Litovchenko). Also, I would appreciate it
 20 if you could coordinate it with Avdeev as
 21 well. Unfortunately, Nilov will be out of
 22 Kiev tomorrow and will not be able to sign
 23 any documents. I hope it is possible to let
 24 him sign the agreement on Monday. We could
 25 provide a fax copy of his signature tomorrow

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 2 "Duly authorized" means all
 3 formalities have been taken care of,
 4 everything is in order. As Mr. Khudyakov
 5 said, we are ready to sign it tomorrow
 6 Ready to sign it doesn't mean we are ready
 7 to put a manual signature on it, but be on
 8 your guard. It doesn't mean we have got our
 9 fingers crossed behind our backs. It means
 10 after these discussions, after these
 11 negotiations that Storm initiated, we are
 12 ready to sign it. They delivered two
 13 certificates, not one but two; one from the
 14 Alpha side, one from Storm, itself, from its
 15 chairman, saying that Nilov was, in their
 16 words, "duly authorized."

17 And it's not our obligation to say
 18 what steps have you followed to assure us
 19 that your man is duly authorized? Did he
 20 have to sign something in green ink? Did he
 21 have to wear a funny hat to a meeting? Did
 22 there have to be a meeting of participants?

23 We are entitled, based on these
 24 documents, as well as on the representation
 25 in the shareholders' agreement, itself, that

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 2 if needed."
 3 So, I suppose what Mr. Khudyakov is
 4 now saying is that when he said we are ready
 5 to sign it tomorrow, what he was really
 6 saying is we are ready to sign it tomorrow,
 7 but that is an empty and meaningless
 8 gesture.

9 When someone says, "we are ready to
 10 sign it tomorrow," that carries with it the
 11 sense that we are ready to sign it tomorrow
 12 with authority. And, again, when we look at
 13 the certificates that were delivered by Mr.
 14 Kosogov and by Mr. Tumanov, Tumanov having
 15 been the chairman at time of Storm, it
 16 doesn't say we had a meeting, it doesn't say
 17 you are invited to come conduct due
 18 diligence to satisfy yourselves that there
 19 is due authority. What it says is this:
 20 "I, Andre Kosogov, do hereby certify that
 21 Valerie Vladimirich Nilov, it says two, is
 22 duly authorized to sign behalf of Storm, b,
 23 the shareholders' agreement dated
 24 January 30, 2004, between and among Telenor,
 25 Storm and Kyivstar."

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 2 this is the binding agreement of the
 3 parties, to assume that they it had followed
 4 their own routine and that's precisely what
 5 we did.

6 Now, Mr. Khudyakov also says that he
 7 gave -- I'm sorry. Mr. Kosogov says that he
 8 gave a certificate, based on his
 9 understanding of Ukrainian law and the
 10 general powers of the general director; in
 11 effect, the president of the company. He
 12 says, "I signed the certificate by relying
 13 on my knowledge of provisions of Ukrainian
 14 law, giving the general director of a
 15 Ukrainian company general authority to act
 16 on behalf of the company, including entering
 17 into agreements on behalf of the company."

18 Well, if he thought that, and I'm sure
 19 he did, we were entitled to think that as
 20 well. It is inconceivable that we were
 21 under a greater burden to test Mr. Nilov's
 22 authority than the people who were actually
 23 running Storm and providing us with the
 24 assurances that has these contracts were
 25 duly authorized.

<p style="text-align: right;">Page 34</p> <p>1 Proceedings 2 And here, I think a key case is a 3 recent Appellate Division decision in New 4 York. It's a case called Odell versus 704 5 Broadway Condominium. It appears at 284 6 Appellate Division 2nd 52, and it's 728 New 7 York Supp. 2nd 464. 8 I can distribute copies if you would 9 like, Mr. Chairman. I have one for each 10 member of the panel. And we can provide one 11 to you as well, Pieter. 12 MR. VAN TOL: Thank you. 13 MR. SILLS: And this appears at tab 14 14 of the binder I have just distributed. 15 And this is a case where the president 16 of a New York corporation had gone and 17 executed a document, supposedly without 18 authorization from the board of directors of 19 the corporation. 20 Now, if you look at what appears as 21 page four of the annex here. This is what 22 the Appellate Division, the appellate court 23 sitting here in Manhattan, had to say. 24 Several well settled principles bear 25 mentioning --</p>	<p style="text-align: right;">Page 35</p> <p>1 Proceedings 2 MR. JENTES: Where are you? 3 MR. SILLS: On page four, towards the 4 bottom of the first column. 5 The paragraph beginning "on the 6 issue." 7 It says, "Several well settled 8 principles bear mentioning. There is a 9 general presumption that the president of a 10 corporation is clothed with the powers 11 which, of necessity, inhere in the position 12 of chief executive." Quoting, the president 13 or other general officer of a corporation 14 has power, <i>prima facie</i>, to do any act which 15 the directors could authorize or ratify. 16 The true test of his authority to bind the 17 corporation is whether at the time he is 18 engaged in the discharge of the general 19 duties of his office and in the business of 20 the corporation. 21 Looking down to the next paragraph, 22 and I think this is the key on the question 23 of apparent authority. "Moreover, plaintiff 24 could reasonably rely on the apparent 25 authority of Leidersdorf, as board</p>
<p style="text-align: right;">Page 36</p> <p>1 Proceedings 2 president, to approve the construction. The 3 rule is well settled that it will ordinarily 4 be presumed that a president of a 5 corporation has the power to make contracts 6 pertaining to the business of the 7 corporation and coming within the apparent 8 scope of his authority. The president's 9 apparent authority exists regardless of 10 whether the president has actual authority 11 to carry out such acts. Furthermore, a 12 president of a corporation has apparent 13 authority to act within the general scope of 14 his office, and such acts are binding on the 15 corporation against one who does not know of 16 any limitation, and there must be a typo, it 17 says or but should read on, the president's 18 true authority. Mr. Leidersdorf, as 19 president of the board, had the power, 20 whether actual, implied or apparent, to 21 approve of the proposed construction and to 22 bind the entire board. 23 That is the rule in this state. That 24 is the rule under New York law. New York 25 law what is the parties expressly agreed</p>	<p style="text-align: right;">Page 37</p> <p>1 Proceedings 2 would govern here. Although I do note that, 3 contrary to the position now being taken by 4 Mr. Maydanyk, at the last hearing there was 5 an express statement by Mr. Van Tol on the 6 record that he and I agreed that Ukrainian 7 and New York law on the question of apparent 8 authority was the same. We still think it's 9 the same. 10 Now, here the claim that is now -- and 11 claim has been something of a moving target, 12 but as I understand it, the claim is 13 essentially that we had a copy of the 14 charter, that there is a construction of the 15 charter that suggests that there wasn't 16 actual authority, and that despite the reams 17 of paper that have been supplied to us to 18 confirm that there had, in fact, been a 19 grant of authority to Nilov, and that he was 20 acting within the scope of his authority, 21 that we, in effect, acted at our peril. 22 Well, here I think it's useful to take 23 the two, Mr. Rabij's affidavit, which is in 24 the record, and then this opinion that's 25 been delivered of Mr. Maydanyk.</p>

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2 Well, if two Ukrainian lawyers are
 3 having this disagreement about whether or
 4 not this does or doesn't come within the
 5 scope of the charter, and whether or not the
 6 2002 authorization rolls forward to 2004,
 7 then I don't see how anyone can say that in
 8 the face of the assurances that we were
 9 given, there wasn't apparent authority that
 10 somehow leapt off the page on this charter.
 11 It certainly didn't leap off the page to
 12 Storm, which presumably has control of its
 13 own records and presumably was in the best
 14 position to say we should have had a
 15 meeting. For that matter, had they been
 16 dealing in good faith, if they, in fact, had
 17 believed that, they simply would have
 18 convened another meeting, because what they
 19 are now claiming is that they engaged in an
 20 elaborate charade. And that charade went
 21 for years.

22 Now, what we just heard was in that
 23 early 2005, they discovered this supposed
 24 infirmity in Mr. Nilov's authority. It is
 25 not true that there was an attack on the

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2 shareholders' agreement because of
 3 Mr. Nilov's lack of authority in 2005. It
 4 is true there has been a relentless,
 5 unremitting attack in the Ukrainian courts
 6 on a whole series of agreements that Storm
 7 has made, because they don't seem to regard
 8 their agreements as worth the paper they are
 9 printed on. But the fact of the matter is
 10 that the first time a claim of Nilov's lack
 11 of authority was made was not in 2005. It
 12 was made secretly in 2006, in the Alperin
 13 case. We did not learn of this claim until
 14 we read in a press release in May of 2006
 15 that Storm was pressing this claim against
 16 itself.

17 And I should mention a small point on
 18 that. There was some discussion last time
 19 about Mr. Marchenko, and when I look at
 20 Mr. Ilyashev's affidavit, he makes it clear
 21 that Mr. Marchenko is his partner.
 22 Mr. Marchenko represented Alperin at the
 23 trial, to the extent there was a trial.
 24 Mr. Ilyashev took over on appeal.
 25 Mr. Marchenko is, in fact, a lawyer, has

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2 appeared for Storm. I understand that he
 3 appeared only this morning in a court in
 4 Karkov, which is a provincial city in
 5 Ukraine, where yet another one of these
 6 assaults in the Ukrainian courts is being
 7 mounted, and he appeared on behalf of Storm.

8 And I think that tells us something
 9 very important about the collusive nature of
 10 the Alperin case, that Mr. Ilyashev and his
 11 partners can appear on both sides of the
 12 supposed controversy.

13 In that regard, I would like to -- I
 14 would like to hand to the panel and, of
 15 course, to Mr. Van Tol, copies of powers of
 16 attorney that have been granted to the
 17 Ilyashev firm, copies of a print of the
 18 Ilyashev and Partners Web site, and a power
 19 of attorney granted by Storm to the Ilyashev
 20 firm, to a partner of the Ilyashev firm, a
 21 Mr. Zinchenko, who also appears on the Web
 22 site.

23 So, that it certainly appears that
 24 Storm's lawyers and Alperin's lawyers are
 25 one in the same.

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2 Now, when I look at Mr. Ilyashev's
 3 affidavit, I'm struck by what wasn't argued
 4 in this Alperin case. There is an elaborate
 5 argument about how the contract should have
 6 been in Ukrainian and should have been
 7 filed, which I think is a matter of
 8 irrelevance, because New York law governs.
 9 And I think at the last hearing there was an
 10 extensive discussion about the Indosuez
 11 case. Indosuez, which is a New York Court
 12 of Appeals case, is conclusive that New York
 13 law and not foreign law governs on the
 14 question of apparent authority when the
 15 parties have elected New York law.

16 Now, Mr. Ilyashev says he argued that
 17 the shareholders' agreement was a sham deed.
 18 That seems to be a very envious argument
 19 that it's, as a matter of Ukrainian law, an
 20 amendment to the charter and, again, has to
 21 be in Ukrainian and has to be filed. Then
 22 he says, Mr. Nilov required an express
 23 authorization. But what's interesting is
 24 that no one, either from Alperin or Storm,
 25 mentioned the fact that there had been a

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 2 2002 meeting. No one mentioned these
 3 certificates.
 4 I noted with interest that our new
 5 expert, Mr. Maydanyk, is of the opinion that
 6 the certificates, although they are formal
 7 and were given in order to induce reliance
 8 in a corporate transaction in which Storm
 9 acquired extremely valuable rights, are in
 10 his view a nullity, because they weren't --
 11 there is no evidence that the certificates
 12 of incumbency were duly authorized.

13 So, they are -- I suppose there would
 14 be an infinite regression of asking who
 15 authorized the authorization of the
 16 authorization, which would destroy the
 17 doctrine of apparent authority. Apparent
 18 authority exists when authority is apparent.
 19 Here it was.

20 The rest of Mr. Ilyashev's affidavit
 21 seems to be an elaborate argument that
 22 Ukrainian law, not New York law, should
 23 govern. No one seems to have made any of
 24 these arguments.

25 And Mr. Klymenko, who also, as the

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 2 current director, you would think would have
 3 supplied an affidavit at least in this
 4 proceeding, saying there was no meeting. I
 5 have reviewed the corporate records and
 6 there is nothing there. From him, we also
 7 have -- he has supplied an affidavit, but
 8 although he presumably has control of the
 9 books and records of Storm, also has never
 10 said there is a lack of authority. Yet
 11 another controlled witness, who you would
 12 think would have offered testimony if he had
 13 favorable testimony to offer for Storm.

14 Finally, Mr. Kosogov, again,
 15 confirming that there was apparent
 16 authority, says "I did not check the
 17 provisions of Storm's charter," the task
 18 that they now claim should have been carried
 19 out by Telenor. And, again, as I think
 20 Mr. Rabij's affidavit makes clear, even had
 21 we done that, it would have seemed clear
 22 that the 2002 authorization was adequate.
 23 For that matter, we had no knowledge at time
 24 that there hadn't been a 2004 meeting or a
 25 unanimous written consent, which I think is

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 2 referred to as written polling in Ukrainian
 3 law, because we were told it was, again, in
 4 the words of both certificates, "duly
 5 authorized," that means all formal steps
 6 necessary to execute this document have been
 7 taken.

8 Contrary to what we were just told
 9 about the discovery of this problem in 2005,
 10 Mr. Kosogov says, "until recently I was not
 11 aware that a special resolution of Storm's
 12 participants was necessary to authorize
 13 Mr. Nilov to enter into the shareholders'
 14 agreement."

15 Well, the fact is there was a meeting.
 16 Mr. Nilov, as the general director of this
 17 company, had extremely broad powers. I
 18 think it's quite clear from Mr. Kosogov's
 19 affidavit, as well as what we heard last
 20 time, and what we saw in Mr. Rabij's
 21 affidavit, that the general director of a
 22 Ukrainian, LLC has extraordinarily broad
 23 powers, broader than the president or chief
 24 executive officer of a New York corporation.
 25 Telenor acted in an entirely correct and

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 2 responsible way.

3 As far as estoppel goes, it was in
 4 reliance on the promise to execute these
 5 agreements that Storm -- I'm sorry, that
 6 Telenor allowed Alpha and its controlled
 7 entity, Storm, to acquire a blocking
 8 position in what is a remarkably valuable
 9 company, worth many billions of dollars.
 10 They then performed under that contract.

11 And, again, the rule in New York is
 12 that once a contract has been fully executed
 13 in the sense that it's been performed, a
 14 company may not set up its own lack of
 15 authority to defeat a contract under which
 16 it's received benefits. They took those
 17 benefits, they operated under the contract
 18 and even after they claim that they
 19 discovered this technical infirmity in their
 20 agreement in 2005, they waited a year or a
 21 year-and-a-half before adding this to the
 22 attacks they were making on their own
 23 contract.

24 And, again, in the binder -- will you
 25 bear with me one second, Mr. Chairman?

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2 If you look at tab one in the binder
 3 of cases we have distributed, it's a case
 4 called Congregation Yetev Lev Visotmar
 5 versus 26 Adar MV Corp.

6 And here, if -- directing the panel's
 7 attention to the second column on page
 8 three, it says the -- it's the paragraph
 9 beginning at the bottom of the column. "The
 10 defense of ultra virus cannot be wielded by
 11 a sword by a plaintiff to invalidate a
 12 contract that has already been fully
 13 performed by both parties," and goes on
 14 citing a number of cases.

15 So here what happened? There is a
 16 negotiated deal. Because Storm and Alpha
 17 were unable to purchase the Omega shares
 18 they had agreed to purchase, Telenor
 19 accommodated Storm. How did we accommodate
 20 them? We accommodated them by signing a
 21 voting agreement that has essentially the
 22 same substantive provisions as a bridge to
 23 the shareholders' agreement with a three-day
 24 trigger. As soon as they succeeded in
 25 wrinkling out the Omega problem, they would

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2 sign the shareholders' agreement.
 3 They bought the Omega shares
 4 eventually. We said, "We are ready to
 5 sign."

6 They kept telling us they weren't
 7 ready to sign and raised a new issue. We
 8 accommodated them. We negotiated over that
 9 issue.

10 Then a senior Alpha official,
 11 Mr. Khudyakov, said, "We are ready to sign,"
 12 and that presumably means we are ready to
 13 sign with authority. And they did sign.
 14 Not once, not twice, but three times. We
 15 got a fax signature of Mr. Nilov, then he
 16 came physically to Mr. Didkovskiy's office
 17 and signed the document manually and put the
 18 stamp on it, which is an act of juridical
 19 significance in Ukraine to put the company
 20 seal on a document, and then he signed it a
 21 third time in Ukrainian.

22 Then the parties operated under that
 23 agreement. Shares were exchanged. They
 24 came to board meetings. They amended the
 25 charter of the company to conform to the

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 2 shareholders' agreement.

3 In 2005, it is true they began their
 4 assault on various agreements they had made,
 5 but they didn't mount this assault until a
 6 year-and-a-half later.

7 I think the record is absolutely clear
 8 that this is a valid, binding and
 9 enforceable agreement. They should be held
 10 to what they did, they should be held to
 11 what they said and we should get on with the
 12 merits of this case, which has been pending
 13 far too long, tied up on a preliminary
 14 question that never should have been
 15 brought.

16 CHAIRMAN FEINBERG: Let the record
 17 reflect what I think is obvious, that in
 18 addition to the Wack affidavit, the panel
 19 admits into evidence into the record on this
 20 motion the various other affidavits that
 21 have been proffered by Storm in the last few
 22 days.

23 MR. CRAIG: I have a question for you,
 24 Pieter.

25 I, too, was struck by the arguments

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2 that you were making at the end of the
 3 session in our last meeting, which seemed to
 4 be inconsistent with the original brief that
 5 Storm submitted in support of its motion to
 6 dismiss.

7 If you look at that brief, the opening
 8 argument, which is repeated many, many
 9 times, is that the panel lacks jurisdiction
 10 to determine its own jurisdiction.

11 In fact, on page five, you say, "if
 12 the agreement containing the arbitration
 13 clause, or if the clause, itself, is found
 14 to be invalid, the panel ceases to have any
 15 power to issues rulings on the merits in
 16 the" -- and that whole argument is that the
 17 panel lacks jurisdiction to hear Telenor
 18 Mobile's claims in this arbitration.

19 You say in two or three places that
 20 were cited to just now, that we do have the
 21 power to determine whether or not this case
 22 should go forward. That is a quote from
 23 page 263. The panel does have the power to
 24 determine whether or not this case should go
 25 forward. We do have the power to determine

<p style="text-align: center;">Page 50</p> <p>1 Proceedings 2 whether or not there was a contract. 3 Is that a change in Storm's position? 4 MR. VAN TOL: No, it's not. And I 5 think it's sort of the tyranny of language. 6 And I think it's actually put better in the 7 Uncitral rules, where it says the 8 arbitration tribunal shall have -- this is 9 Article 21. I'm sorry.</p> <p>10 The arbitration tribunal shall have 11 the power to rule on objections that it has 12 no jurisdiction. And then it goes on to 13 say, including any objections with respect 14 to the existence or validity of the 15 arbitration clause or of the separate 16 arbitration agreement.</p> <p>17 The better way to say it is you have 18 power to determine your jurisdiction or 19 whether you have jurisdiction.</p> <p>20 MR. JENTES: Including the validity of 21 the arbitration clause; right?</p> <p>22 MR. VAN TOL: Correct. And that's 23 right.</p> <p>24 What that turns on, though, is an 25 analysis of the arguments under Sphere</p>	<p style="text-align: center;">Page 51</p> <p>1 Proceedings 2 Drake; in other words, if we thought that 3 you didn't have the jurisdiction to even 4 determine your jurisdiction, we wouldn't 5 have brought the motion to dismiss before 6 you. We would have gone to whatever court 7 has competent jurisdiction.</p> <p>8 And I apologize if it's unclear. I 9 am -- I was trying to make it clear at the 10 last hearing, and it is loose language and I 11 apologize.</p> <p>12 What I am saying is, as Uncitral says, 13 you may look and see if you have 14 jurisdiction. That depends on whether or 15 not a contract was formed. But Sphere Drake 16 tells us you are not doing a full-blown 17 hearing on the merits, let's determine for 18 all end of time whether or not there was a 19 contract. You are analyzing it under the 20 Sphere Drake standard. You are asking 21 yourself has Storm shown me some evidence 22 that there was not a contract? If that is 23 the case, then the issue of contract 24 validity and formation gets kicked to a 25 court of competent jurisdiction.</p>
<p style="text-align: center;">Page 52</p> <p>1 Proceedings 2 CHAIRMAN FEINBERG: So, you are 3 saying -- and I am just repeating what I 4 think you just said. For us to decide the 5 jurisdictional issue, requires us to decide 6 under Sphere Drake the contractual issue.</p> <p>7 MR. VAN TOL: Correct.</p> <p>8 MR. CRAIG: What do you say about 9 Mr. Sills' interpretation of Sphere 10 Drake that kicks it into an evidentiary 11 hearing, rather than to a court. If we find 12 that there is some basis to believe that 13 there was an invalid contract, that the 14 thing to go forward is an evidentiary 15 hearing here.</p> <p>16 MR. VAN TOL: In a court. Sphere 17 Drake is saying you have a right to a court 18 hearing and a determination of whether there 19 is contract, not a hearing before an 20 arbitral tribunal.</p> <p>21 MR. JENTES: It seems to me so 22 circular. If we have jurisdiction under 23 Article 21 to decide the validity of the 24 arbitration clause, don't we go forward and 25 decide that? Why should we be referring it</p>	<p style="text-align: center;">Page 53</p> <p>1 Proceedings 2 to somebody else? That's just so contrary 3 to everything I have ever dealt with in 4 international commercial arbitration, 5 whether it's ICC, ICDR or Uncitral rules.</p> <p>6 MR. VAN TOL: It comes down to, it 7 comes down to the void versus voidable 8 issue.</p> <p>9 If we are arguing that we cannot be 10 compelled to arbitrate, but we also agree 11 under -- to be guided by the Uncitral rules, 12 our only choice, and this what is we made 13 the determination of early on, is to come to 14 you, as the tribunal, and say we understand 15 that Telenor Mobile wants to arbitrate, but 16 we never agreed to either the agreement or 17 the arbitrable clause within the agreement, 18 and that's what the Ukrainian courts have 19 found.</p> <p>20 So, we go to you, and when the issue 21 goes to you, you sit as a court would on a 22 motion to compel arbitration. And what the 23 Court says is, okay, let's use a summary 24 judgment standard. And I just heard 25 Mr. Sills agree with it.</p>

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2 He has a high burden. What he has to
 3 show is that there are no issues of fact
 4 here. I think at a minimum what we have
 5 established over these three hearings is
 6 that there is certainly an issue of fact on
 7 every one of the issues that have been
 8 raised.

9 On actual authority, we have findings
 10 of fact from the Ukrainian courts that were
 11 was no meeting of participants. Mr. Sills
 12 says we don't have the evidence that no such
 13 meeting took place. Well, he hasn't shown
 14 that it did take place.

15 We have Mr. Ekhougen from Telenor
 16 Mobile. He got a new power of attorney for
 17 the 2004 agreement. You have to ask
 18 yourself, why didn't he sit there and say,
 19 well, I wonder why, I wonder why Storm isn't
 20 getting new certificate of authority?

21 But point is that we are -- the
 22 summary judgment a standard applies, and we
 23 both agree it does. At a minimum, you have
 24 to find that there is an issue of fact for a
 25 court to determine.

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2 for myself, I think your affidavits have
 3 raised a question as to which law applies.

4 MR. VAN TOL: Okay. Setting that
 5 aside and going under the Uncitral rules, if
 6 I go back to Article 21, it says you have
 7 the power to rule on our objection.

8 Our objection is that you have no
 9 jurisdiction. It's the same as if you go to
 10 a federal court, and someone sues you and
 11 you appear, you make a limited appearance,
 12 and you say, "I'm appearing to fight your
 13 jurisdiction. You can determine this, but
 14 when I am doing this I am not submitting to
 15 your jurisdiction. I want you to find that
 16 you have no power over me." We are in the
 17 same boat.

18 MR. JENTES: See, that's where I
 19 disagree.

20 Let's assume we were sitting in the
 21 Southern District of New York, and we were
 22 with exactly the same proposition, and you
 23 told the Southern District of New York that
 24 it had to decide the kind of issues you have
 25 said we have to decide.

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2 MR. JENTES: I have got to tell you
 3 that I just don't read First Options that
 4 way. I don't read the Shaw case that way.
 5 I am prepared to get convinced otherwise.

6 It seems to me what will the whole
 7 Shaw approach, the whole First Options
 8 approach is there are certain issues for the
 9 arbitration panel to decide. And here we
 10 have, I think, the authority to decide
 11 whether or not there is a valid arbitration
 12 agreement. It's not for the courts; that's
 13 for us.

14 And Sphere Drake, in the CCA second,
 15 doesn't have anything to do with that. In
 16 other words, that standard seems to me to be
 17 only applicable if they didn't have an
 18 Uncitral type of rule, and Sphere Drake is
 19 an instance where there was no Uncitral type
 20 rules.

21 MR. VAN TOL: But we have agreed, and
 22 the contract combines Uncitral and New York
 23 law --

24 MR. JENTES: Let's put New York law
 25 aside for the moment, because speaking only

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2 I think the Southern District of New
 3 York would say no, you are in the wrong,
 4 wrong location. Go to the arbitrable
 5 tribunal. They are the ones that have to
 6 decide this jurisdictional issue, including
 7 the validity of the arbitration clause.

8 And let me add the other Phillip to
 9 it. If you look at paragraph two of the
 10 Article 21, that is the one that provides
 11 for arbitrable, separation. Then it seems
 12 to me what it concludes is, even if we were
 13 to decide that the underlying contract were
 14 null and void, it would not entail ipso jure
 15 the invalidity of the arbitration clause.
 16 That seems to me to reinforce the fact that
 17 we are supposed to carve out the
 18 jurisdiction to rule on and decide whether
 19 or not there is a valid arbitration clause.
 20 We treat that as an independent issue from
 21 all of this stuff with regard to the
 22 validity of the underlying contract.

23 MR. VAN TOL: Even if you did that,
 24 assuming that's the case, you do so under
 25 the Sphere Drake standard; in other words,

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 2 let me back up because you made two points.
 3 I think it's -- we can all agree that your
 4 ability to hear disputes between the parties
 5 is limited by the contract, and it's limited
 6 by the parties agreement --

7 MR. JENTES: Correct.

8 MR. VAN TOL: -- so I would have to
 9 respectfully disagree with you that if I
 10 went to a Court on the same facts, the Court
 11 would say, well, I'm uncomfortable, because
 12 I need -- I think it's clear evidence it
 13 says -- clear and unmistakable evidence that
 14 both parties have agreed to arbitrate all
 15 these issues that you now say are before me.
 16 That's what they did in Sphere Drake, and
 17 the Court said, as long as you can come up
 18 with some evidence that you didn't agree to
 19 arbitrate, whether we are talking about
 20 arbitrate under the whole agreement or an
 21 independent, severable arbitration clause,
 22 if you come up with some evidence to that
 23 effect, you, in this case Storm, are
 24 entitled to have a court determine that,
 25 either at a hearing or at a trial on the

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 2 merits.
 3 MR. JENTES: But then doesn't that run
 4 into a clear conflict from Uncitral? Then
 5 we are before the Southern District of New
 6 York. It's going to have a hearing and it's
 7 going to decide one way or the other.
 8 What's for the arbitration tribunal to
 9 decide?

10 Under your argument, that will have
 11 already have been tried, to a jury yet, in
 12 New York. What are we going to decide on
 13 our jurisdiction?

14 MR. VAN TOL: You could decide that
 15 it's collateral estoppel and you will follow
 16 what the court decided.

17 MR. JENTES: As a practical matter,
 18 that moots the whole point of the Uncitral
 19 rules. The whole point of the Uncitral
 20 rules is get it out of the courts; that
 21 seems to me to be clearly what's intended.

22 MR. VAN TOL: This feels like
 23 Socrates.

24 MR. JENTES: No, no. I agree. It's
 25 tough issues, really tough issues.

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 2 MR. VAN TOL: We are not that far
 3 apart, because what I am saying under
 4 Uncitral, when they use the word "power"
 5 they are saying to Storm, go to the tribunal
 6 first and have the tribunal decide whether
 7 are you right in objecting to the validity
 8 of the contract.

9 Now, in doing so, you are guided by or
 10 controlled, I think the parties have agreed,
 11 by Sphere Drake. You are not sitting here
 12 with a clean slate. We have all agreed that
 13 the standard to be applied is: Is there
 14 some evidence that there is no contract?

15 Because the courts are very leary,
 16 Uncitral or not, of forcing a party that
 17 didn't agree to arbitrate to go to
 18 arbitration, because it's the idea that
 19 everyone has --

20 MR. JENTES: Unless they separately
 21 agreed, that's Easterbrook's statement,
 22 unless they separately agreed to arbitrate.

23 MR. VAN TOL: And there is no evidence
 24 here that there is such a separate agreement
 25 to arbitrate, and there is no case that

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 2 Mr. Sills came up with that is on all fours,
 3 where there is Uncitral rules or there is a
 4 severability provision, and the court has
 5 said that's enough.

6 MR. CRAIG: Mr. Van Tal, that's why I
 7 took such comfort from your words the last
 8 time we were meeting on August 14th.

9 The chairman asked you the question:
 10 "If we rule for Telenor and find
 11 jurisdiction to arbitrate, you are going to
 12 the U.S. District Court or are you going to
 13 a Federal Court?"

14 And you say, "it depends on what you
 15 rule. If you rule simply that you have
 16 jurisdiction to determine the issue of
 17 contract formation, and for some reason you
 18 want to hear more about what happened in the
 19 Ukraine to satisfy yourself, then we will
 20 await your decision. We said earlier, when
 21 we say you are allowed to apply Ukraine law,
 22 we mean it literally. We want you to take
 23 the law that has been determined by the
 24 Ukraine and apply it here and say, sorry, no
 25 contract."

<p style="text-align: right;">Page 62</p> <p>1 Proceedings 2 Now, I took that to mean that you said 3 we had the authority to apply the facts as 4 we find them, to look at the Ukraine law, 5 the New York law, whatever we find is 6 applicable; that we at least had the 7 authority to determine our own jurisdiction. 8 MR. VAN TOL: You do. You do in light 9 of and under the Sphere Drake standard. 10 CHAIRMAN FEINBERG: But you are also 11 saying, I take it, that having exercised 12 that jurisdiction, if we decide, having 13 exercised that, to bootstrap that and say 14 that the underlying contract is valid, you 15 are going to run to the U.S. District Court 16 to upset our ruling; in other words, you are 17 going to say in the U.S. District Court, 18 they had jurisdiction to decide the validity 19 of the contract, but they decided it 20 incorrectly. 21 MR. VAN TOL: That's right. 22 Because -- and that's because we are in the 23 unusual situation where we have a foreign 24 court has already decided this issue. I 25 mean, I think we can all agree that this</p>	<p style="text-align: right;">Page 63</p> <p>1 Proceedings 2 case is sui generis. But I mean, that is 3 what separates it. There is a Ukrainian 4 court saying no contract. 5 So it is not proper for you to sit and 6 go back over the findings of fact of the 7 Ukrainian court. All I have to do is say, 8 is show that the Ukrainian court was not 9 coming out of left field, there were no 10 procedural irregularities, and under New 11 York law and the New York convention, you 12 have to follow what the Ukrainian court 13 said. 14 CHAIRMAN FEINBERG: Aren't you going 15 to be hard pressed to convince a federal 16 court that the contract and the Uncitral 17 rules permitted the panel to decide the 18 validity of that contract, but they made a 19 mistake in finding it valid and now we want 20 to you upset it? 21 MR. VAN TOL: I'm not saying that you 22 are deciding whether or not there is enough 23 evidence of contract formation. That is a 24 fine point. And I thank the arbitrators for 25 that. I'm sorry if I have been unclear.</p>
<p style="text-align: right;">Page 64</p> <p>1 Proceedings 2 You are determining, as a threshold 3 matter, has Storm shown me enough that there 4 is no contract; or, conversely, it really 5 should be stated affirmatively. It's 6 Telenor Mobile's burden to show that there 7 are no issues of fact, that if you were 8 sitting as a court you would have to find as 9 a matter of law that a contract exists. 10 MR. JENTES: Let me ask Mr. Sills a 11 question that is closely related to this. 12 Let's assume that we basically 13 followed the Uncitral rules. We address 14 paragraph one of Article 21, and on 15 paragraph two we sort of say, well, we are 16 not going to get to that; that is, we don't 17 get to the question as to whether or not 18 there was valid shareholders' agreement or a 19 valid voting agreement. We only focus on 20 whether or not there was an arbitration 21 agreement. 22 If we do that, what's the authority 23 for the proposition that there was a valid 24 arbitration agreement? 25 Can that be? You look puzzled.</p>	<p style="text-align: right;">Page 65</p> <p>1 Proceedings 2 MR. SILLS: I'm not grasping the 3 question for some reason. 4 MR. JENTES: What I am trying to do is 5 to sever the issue of whether or not there 6 is a valid arbitration agreement from 7 whether or not there is a valid underlying 8 shareholders' agreement. 9 And let's assume for the moment, since 10 that's the issue that Pieter has raised for 11 us, we say, okay, we are only going to look 12 at the question of whether or not there is a 13 valid arbitration agreement. What, in a 14 nutshell, do you maintain is the basis for a 15 finding by us that there is a valid 16 arbitration agreement? 17 MR. SILLS: It's Article 21 of the 18 Uncitral rules. Those are a part. I think 19 -- 20 MR. JENTES: No, no. Let me be more 21 precise. 22 Was there an agreement reached in 23 2002, written or oral, that there is an 24 agreement to arbitrate? If not, was there 25 an agreement reached in 2004 to arbitrate?</p>

<p style="text-align: right;">Page 66</p> <p>1 Proceedings 2 Was it oral, was it written, was it by a 3 course of conduct? 4 I am not trying to be a law professor. 5 I'm just trying to indicate if we go down 6 the Uncitral route, and only focus on 7 paragraph one, what do we rely on for the 8 proposition there was an arbitration 9 agreement?</p> <p>10 MR. SILLS: On the 2004 shareholders' 11 agreement that was signed by Mr. Nilov. And 12 I know we went over this at the last 13 hearing, but I think it bears repeating, 14 Mr. Jentes.</p> <p>15 The Uncitral rules have a strong 16 severability provision in them. And by 17 entering into an agreement -- maybe there is 18 some common ground on this between Storm and 19 Telenor.</p> <p>20 If you refer to particular arbitration 21 rules, they become part of the contract. I 22 think that is undisputed. The Uncitral 23 rules expressly provide that the arbitration 24 clause is fully severable from the contract 25 of which it forms a part, so that this</p>	<p style="text-align: right;">Page 67</p> <p>1 Proceedings 2 contract, the 2004 executed, in their words, 3 duly authorized contract, it's as if it were 4 two separate agreements. 5 And if, instead of signing the 2004 6 shareholders' agreement in the physical form 7 in which we have it, Mr. Nilov had signed 8 the 2004 shareholders' agreement in a 9 separate piece of paper called arbitration 10 agreement, it would be legally 11 indistinguishable from what we have now. 12 And there can't be any serious argument that 13 Mr. Nilov, as the general director of a 14 Ukrainian limited liability company, lacked 15 authority to enter into an arbitration a 16 agreement.</p> <p>17 MR. JENTES: That is the key point. 18 Is that -- what is the support for that 19 proposition? In other words, let's assume 20 for the moment that ultimately we decide he 21 didn't have any authority to enter into the 22 shareholders' agreement, but he did have 23 authority to enter into the arbitration 24 agreement.</p> <p>25 MR. SILLS: Well, there is two. There</p>
<p style="text-align: right;">Page 68</p> <p>1 Proceedings 2 is the legal authority begins at least with 3 Prima Paint and rolls forward, but even on 4 the terms that have now been presented for 5 the claim of lack of authority, there is 6 absolutely nothing in the charter that 7 suggests that Mr. Nilov lacked authority to 8 agree to arbitrate rather than litigate a 9 dispute.</p> <p>10 CHAIRMAN FEINBERG: Let me make it 11 easier.</p> <p>12 Am I correct, Storm, you don't 13 challenge the proposition that, under 14 agreements entered into in the Ukraine and 15 the Uncitral rules, we have jurisdiction to 16 decide the validity of the underlying 17 contract?</p> <p>18 MR. VAN TOL: So long as you do so 19 under Sphere Drake, I don't disagree with 20 that.</p> <p>21 CHAIRMAN FEINBERG: Right. You don't 22 have to get into all that other arguments 23 you are making. There is room here.</p> <p>24 But what you say is, Storm, the only 25 decision we can make that's legal, is,</p>	<p style="text-align: right;">Page 69</p> <p>1 Proceedings 2 having exercised that jurisdiction, to find 3 that the underlying contract is invalid, 4 and -- under Sphere Drake; and, therefore, 5 we agree with Telenor. You have 6 jurisdiction to decide that the underlying 7 contract is invalid; that's your position in 8 a nutshell.</p> <p>9 MR. VAN TOL: That's close. If I 10 could restate it though to pick up on the 11 last point.</p> <p>12 Let's assume, for purposes of 13 argument, that there are two agreements; 14 that there is a separate agreement to 15 arbitrate, that Mr. Nilov had authority to 16 sign an agreement to arbitrate under 17 Uncitral.</p> <p>18 Fine. Let's assume that for purposes 19 of the argument.</p> <p>20 If he had that, what then are you 21 going to decide? You are going to decide 22 whether or not a contract was validly 23 formed.</p> <p>24 MR. JENTES: Which contract now? 25 MR. CRAIG: The shareholder agreement.</p>

<p style="text-align: right;">Page 70</p> <p>1 Proceedings 2 MR. VAN TOL: I'm assuming for 3 purposes of this argument that there is, and 4 I'm not conceding that, but I'm assuming for 5 these purposes. What are you going to 6 decide? You are going to decide whether or 7 not there was a 2004 shareholders' 8 agreement. We will stop there. 9 There is a court finding from the 10 Ukraine that there is no agreement, so you 11 are bound by that either way. 12 CHAIRMAN FEINBERG: I understand that. 13 But why are you hedging on assuming for a 14 minute authority on arbitration? You have 15 admitted we have jurisdiction to decide the 16 validity of the contract. Why do you hedge 17 on where that jurisdictional authority comes 18 from? 19 You have even said that again today 20 that we have jurisdiction. Now, what you 21 are really saying is there is only one way 22 under the law to exercise that jurisdiction; 23 that is to strike down the shareholders' 24 agreement. 25 But I want to make sure I understand</p>	<p style="text-align: right;">Page 71</p> <p>1 Proceedings 2 here that, once again I think for the tenth 3 time, you agree that we have, under the 4 Uncitral rules -- 5 MR. VAN TOL: The power. 6 CHAIRMAN FEINBERG: -- the power to 7 decide the validity of the underlying 8 contract, shareholder agreement. 9 Where does that come from? Why do you 10 say, well, let's put it aside for a minute. 11 Let's make an assumption. 12 Where is that authority to decide? 13 MR. VAN TOL: You have the authority 14 under the Uncitral rules to decide your 15 jurisdiction. 16 CHAIRMAN FEINBERG: Right. 17 MR. VAN TOL: That comes from the 18 contracts. We are assuming that Mr. Nilov 19 had authority to at least sign that. 20 CHAIRMAN FEINBERG: When you say 21 "assuming," do you agree that we have that 22 jurisdiction? Not assuming that Mr. Nilov, 23 you have admitted -- I don't mean to cross 24 examine, but it's critical. 25 You have admitted last time and again</p>
<p style="text-align: right;">Page 72</p> <p>1 Proceedings 2 today we have the power to decide. What is 3 the basis for that power in Storm's 4 position? 5 MR. VAN TOL: It's got to be the 6 arbitration clause. 7 CHAIRMAN FEINBERG: Of the shareholder 8 agreement? 9 MR. VAN TOL: Correct. 10 CHAIRMAN FEINBERG: Okay. And we have 11 that, that arbitration clause, we have 12 actual power to decide. 13 And your gripe is, in your motion, go 14 right ahead and decide, but there is only 15 one way you can decide under the law of the 16 Second Circuit; that's your position. 17 MR. VAN TOL: Right. And for -- just 18 so I am clear, for two reasons though. One 19 is a jurisdictional reason. You apply 20 Sphere Drake. Mr. Sills agreed with that. 21 It was his idea. I don't know if he's 22 backing away from it, but he agreed Sphere 23 Drake applies. 24 So, what you do, first, is you say do 25 I have jurisdiction under Sphere Drake? If</p>	<p style="text-align: right;">Page 73</p> <p>1 Proceedings 2 the answer is no, dismiss. 3 Second, if you find you do have, that 4 the Sphere Drake standard has been satisfied 5 by Telenor Mobile, then we go on to the 6 question of contract validity. And then, 7 again, what I am saying is you are bound by 8 finding of the Ukrainian court. 9 CHAIRMAN FEINBERG: That couldn't be 10 clearer. To me that is very clear. 11 Mr. Sills, your position is very clear 12 to me, and unless somebody has anything else 13 to argue about this, is there anything else 14 anybody wants to say about this? I mean, it 15 couldn't be clearer, it seems to me. To me. 16 I am not sure my fellow panelists agree. 17 Your clarification in the last five 18 minutes is very important to me and I 19 understand it, and I just want to make sure 20 I understand it. 21 Is there anything else to be added 22 now? 23 MR. JENTES: I do want to ask a 24 question. 25 CHAIRMAN FEINBERG: Go ahead.</p>

<p style="text-align: right;">Page 74</p> <p>1 Proceedings 2 MR. JENTES: We got up to it, but I 3 didn't quite hear the answer. 4 Is there any dispute that Mr. Nilov 5 could have entered into the arbitration 6 agreement, even though there was no meeting 7 of participants, no -- all the rest of the 8 rigmarole.</p> <p>9 MR. VAN TOL: I haven't seen anything 10 in charter and that's the only corporate 11 document I have. I haven't seen anything in 12 charter that would bar him from doing so, so 13 long as the agreement doesn't have to do 14 with the transfer of Kyivstar shares.</p> <p>15 My hesitation is: Is this truly 16 severable? Is it so intimately --</p> <p>17 MR. JENTES: I understand that.</p> <p>18 MR. VAN TOL: -- interrelated? I want 19 to preserve that argument.</p> <p>20 Assuming there is -- you can cleave 21 off a separate arbitration agreement, I 22 don't think it falls within any of the 23 limitations under Article 12.4.</p> <p>24 MR. JENTES: Does it have to be in 25 Ukrainian and registered?</p>	<p style="text-align: right;">Page 75</p> <p>1 Proceedings 2 MR. VAN TOL: That I don't know. 3 Again, here, I am guessing as a Ukrainian 4 lawyer, but my understanding of that finding 5 on the filing was because it had -- the 6 shareholders' agreement affected the 7 charter, the foundational document.</p> <p>8 I don't see how, sitting here, how an 9 agreement to arbitrate could affect a 10 foundational document.</p> <p>11 MR. CRAIG: I have one more question.</p> <p>12 CHAIRMAN FEINBERG: Go ahead.</p> <p>13 MR. CRAIG: This will be quick.</p> <p>14 CHAIRMAN FEINBERG: No, no. I say go 15 ahead out of frustration, not out of the 16 number of questions, just the complexity of 17 the issue.</p> <p>18 MR. CRAIG: It has to do with whether 19 or not there was a meeting of participants 20 to consider the 2004.</p> <p>21 Let's assume for the moment that we 22 accept the notion that it was a new 23 agreement, a new shareholders' agreement, 24 referred to as NSA in some of these 25 affidavits. What is the state of the record</p>
<p style="text-align: right;">Page 76</p> <p>1 Proceedings 2 right now about whether or not there was a 3 meeting of participants?</p> <p>4 MR. VAN TOL: The state of the record 5 is no one from my client has any information 6 that were was a meeting of participants. 7 There is nothing in the files.</p> <p>8 MR. CRAIG: Is there no one in the 9 Storm hierarchy that can testify that there 10 was no such meeting?</p> <p>11 MR. VAN TOL: The problem is tracking 12 down any of the participants that would have 13 been there. I don't think there is anyone. 14 We don't control Mr. Nilov, so the best we 15 can say is that anyone who would have been 16 aware of it is unaware of it. Anyone who 17 has looked at the files doesn't know of one, 18 Mr. Wack doesn't know of one. Mr. Kosogov, 19 who was closely involved in these matters, 20 has no recollection of there being a meeting 21 of participants.</p> <p>22 Telenor Mobile hasn't come up with a 23 scrap of evidence there was meeting of 24 participants.</p> <p>25 MR. CRAIG: I think I heard Mr. Sills</p>	<p style="text-align: right;">Page 77</p> <p>1 Proceedings 2 make the affirmative contention that there 3 was such a meeting.</p> <p>4 MR. SILLS: No.</p> <p>5 CHAIRMAN FEINBERG: Mr. Sills says its 6 irrelevant based on apparent authority.</p> <p>7 MR. SILLS: The actual authority for 8 that matter.</p> <p>9 MR. VAN TOL: Mr. Sills, to be clear, 10 did say at the very first meeting that 11 Mr. Wack would testify there was a meeting 12 of participants.</p> <p>13 MR. SILLS: In 2002, and there was.</p> <p>14 MR. VAN TOL: He didn't say that then; 15 we found out now. No one -- you know, look, 16 there was a meeting of participants in 2002.</p> <p>17 MR. JENTES: Where is Mr. Nilov?</p> <p>18 MR. VAN TOL: He is not controlled by 19 Alpha. If we had him under our control, we 20 would have an affidavit from him today.</p> <p>21 MR. JENTES: Where is he?</p> <p>22 MR. VAN TOL: I don't know.</p> <p>23 MR. SILLS: Mr. Jentes, we do know 24 where he is.</p> <p>25 Let me distribute, if I could, to the</p>

<p style="text-align: right;">Page 78</p> <p>1 Proceedings 2 panel -- 3 MR. VAN TOL: Is this the same thing 4 we saw last time from the internet? 5 MR. SILLS: I don't believe so. 6 CHAIRMAN FEINBERG: Yes. 7 MR. SILLS: Mr. Nilov works for Alpha 8 Capital. Alpha Capital is a wholly owned by 9 Alpha Group Consortium just as is Altimo. 10 Altimo owns 100 percent of Storm. 11 The notion that he is not a controlled 12 witness is fanciful. If this proceeding 13 were in federal court in New York, and there 14 were a jury, we would be entitled, as a 15 matter of law, to a missing witness charge 16 if Mr. Nilov weren't called to the stand on 17 this issued. I don't think there can be any 18 serious dispute about that. 19 MR. VAN TOL: If we were in court, we 20 would have some authentication of this. I 21 did the same internet search that Mr. Sills 22 did and all I could find was 2002, 2003 23 documents. 24 I have no the evidence Mr. Nilov is 25 currently in our control. If he were, I</p>	<p style="text-align: right;">Page 79</p> <p>1 Proceedings 2 would have him here. 3 CHAIRMAN FEINBERG: Anybody have 4 anything else to add on the motion or is the 5 record -- let me ask one logistical question 6 of Mr. Sills. 7 Mr. Sills, on the basis of what's 8 transpired today, are you prepared yet, and 9 you are not obligated to, to let the panel 10 and Storm know whether you are going to take 11 advantage of the September 8 deadline to 12 submit anything further on the motion? 13 MR. SILLS: If you could bear with me 14 one second, Mr. Chairman. 15 CHAIRMAN FEINBERG: You are not 16 obligated, Mr. Sills, to answer my question 17 now, unless it's readily apparent. I'm not 18 looking to -- you can leave the question 19 open. 20 MR. SILLS: Mr. Chairman, our interest 21 is in moving this case along. I think an 22 extremely simple issue has been complicated 23 in a variety of ways that the claim keeps 24 morphing. 25 I'm glad to hear that we are back to</p>
<p style="text-align: right;">Page 80</p> <p>1 Proceedings 2 agreeing that this case can be decided. I 3 think the record is largely closed. 4 The suggestion that was just made, 5 that the document we just distributed is in 6 some sense inauthentic, is a forgery, I 7 think is offensive and unfounded. And I 8 would like to, I would like, to the extent 9 that there is any credence given to that, I 10 would like to supplement the record on that 11 point. 12 Other than that, we have no 13 evidentiary submission we wish to make on 14 the 8th, because I think the record is more 15 than ample for the panel to make this 16 decision. 17 CHAIRMAN FEINBERG: I suggest the 18 following: Let's take a break for about 15 19 minutes while the panel convenes and I find 20 out where my brethren are coming from. And 21 then we should reconvene on the quite -- 22 assuming that we take this all under 23 advisement, on the second issue of discovery 24 and scheduling. 25 So why don't we take a 15 minute break</p>	<p style="text-align: right;">Page 81</p> <p>1 Proceedings 2 and then we will reconvene here? 3 (Recess taken.) 4 CHAIRMAN FEINBERG: The panel has 5 consulted and in terms of calendar, what 6 about the following, in light of what the 7 parties have told us today. 8 Can we accelerate proposed findings of 9 fact and conclusions of law on the sole 10 issue of the panel's jurisdiction to 11 arbitrate? Can we accelerate those proposed 12 findings no later than one week from today 13 at 5 o'clock? 14 I'm not sure, on the basis of what I 15 have heard today, that it requires even that 16 long, but -- but on the single question or 17 issue of authority to arbitrate, can we have 18 any findings of fact or law -- in law to the 19 panel no later than one week from today at 20 5 o'clock? 21 MR. SILLS: That is certainly 22 acceptable to Telenor, Mr. Chairman. 23 MR. VAN TOL: It is to Storm, too. 24 CHAIRMAN FEINBERG: That will 25 anticipate a partial decision by the panel</p>

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 2 on the singular issue of jurisdiction to
 3 arbitrate this dispute. With the notion, I
 4 think I speak for my fellow panelists who
 5 will undoubtedly want to clarify this, but
 6 on the notion that the panel will shortly
 7 thereafter the 8th render a decision on this
 8 issue of jurisdiction to arbitrate the
 9 dispute; in other words, we will decide the
 10 motion proffered by Storm. And that's all
 11 we contemplate deciding.

12 Is that understandable?

13 Comprehensible?

14 Then what we turn our attention to,
 15 assuming, assuming for a moment a big
 16 assumption that the Motion to Dismiss is
 17 denied, do we have an agreement among the
 18 parties on arbitration hearing dates and any
 19 pre-arbitration hearing discovery leading up
 20 to those dates? And where are we on that
 21 subject?

22 MR. SILLS: Mr. Van Tol and I did
 23 speak, as you had requested, and looking at
 24 our respective calendars, it struck us that
 25 the full hearing on the merits, although I

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 2 think we are in agreement that the issues
 3 are not entirely legal issues, largely legal
 4 issues calling for little, if any,
 5 testimony, could be accommodated during the
 6 second full week in November; that would be
 7 the week of the 13th, in the Wednesday,
 8 Thursday and Friday of that week work best
 9 for us personally.

10 CHAIRMAN FEINBERG: Is that is
 11 November 15, 16 and 17?

12 MR. SILLS: That is exactly right,
 13 Mr. Chairman.

14 MR. VAN TOL: With the only caveat
 15 from Storm, and Mr. Sills and I discussed
 16 that, if the non-compete issues appears to
 17 be more fact intensive than we anticipated,
 18 perhaps something to be discussed is the
 19 possible bifurcation of corporate governance
 20 from non-complete. But as I sit here today,
 21 I'm not sure the non-compete is going to
 22 require that much and I would like to try to
 23 adhere to the schedule that Mr. Sills
 24 articulated.

25 CHAIRMAN FEINBERG: It also implicit

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 2 in what both of you say, to the extent that
 3 are evidentiary, as opposed to legal issues,
 4 Mr. Sills, that you guys think that you can
 5 work out consensually any prehearing
 6 discovery related to those issues or should
 7 we turn our attention to that?

8 MR. SILLS: We haven't discussed it.
 9 I'm encouraged by the fact that we agreed on
 10 the schedule. Perhaps, if we could go off
 11 the record and discuss it informally, I
 12 would hope we could agree and just put the
 13 agreement on the record. Otherwise we could
 14 do it more formally.

15 MR. VAN TOL: I'm confident we will be
 16 able to work out a discovery schedule, if we
 17 don't want tie up the tribunal's time. I
 18 have never had difficulty with Mr. Sills in
 19 scheduling before and I don't see one now.

20 MR. SILLS: For example, we haven't
 21 discussed whether there would be
 22 depositions. I know that is an issue that
 23 different Uncitral panels have ruled on
 24 differently, at least in my experience. And
 25 there is, as I am sure the panel knows, in

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 2 Uncitral proceedings in particular and
 3 international arbitration, there is a lot of
 4 movement as to the content of discovery.
 5 I'm confident we will be able to work out
 6 timing.

7 CHAIRMAN FEINBERG: Well, when you say
 8 both sides seemed conspicuously confident
 9 about being able to work out discovery;
 10 therefore, what we might do, since you both
 11 seem rather confident as to the hearing date
 12 and any discovery that might be needed
 13 leading up to that hearing date, why don't
 14 you take it upon yourselves to work out --
 15 I'm just suggesting my view -- working out
 16 whatever discovery schedule you can consent
 17 to, coming back to the chair only if there
 18 is a problem on any prehearing discovery.

19 MR. SILLS: I think that makes sense,
 20 and I'm confident we won't have to burden
 21 you with that. I think we will be able to
 22 work it out.

23 CHAIRMAN FEINBERG: Let me ask my
 24 fellow panelists whether the 15, 16 and 17th
 25 of November here in New York City is

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2 workable?

3 MR. CRAIG: Fine with me.

4 MR. JENTES: Real problems, I'm sorry.
5 I have a longstanding, very contentious
6 arbitration scheduled to start on the 9th
7 and it's supposed to run through the 17th.
8 I don't know whether it will go forward all
9 of that second week or not, but it so far
10 has been very difficult.

11 This is not a happy thing. I am free
12 the 20, the 21st and the 22nd, reminding you
13 the 23rd of November is Thanksgiving. I
14 then have an arbitration in Bermuda during
15 the week of November 27th. I am then free
16 the weeks of December 4th and the week of
17 December 11th.

18 MR. SILLS: On the governance issues,
19 that is the question of whether or not Storm
20 should be obligated to conform to the
21 promise in the shareholders' agreement that
22 they attend shareholders and that their
23 nominees attended Board of Directors
24 meetings it seems to me there is, it's hard
25 for me to say see what testimony there would

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2 be on that. It's important to the company,
3 to Telenor, to get this decided because of
4 the potential paralysis of a very valuable
5 operating company.

6 Is there any possibility that we could
7 advance the hearing rather than delay it
8 into October? It seems to me this is
9 essentially going to be decided largely on
10 papers and with a one-day argument, so if we
11 could free up a day, say at the end of
12 October, we could do it. Otherwise, we, I
13 would think the first two days of
14 Thanksgiving week, rather than that
15 Wednesday, which would be tough on
16 everybody, would work for me, though my
17 preference would be to advance it rather
18 than delay it.

19 MR. VAN TOL: My preference, subject
20 to the tribunal's availability, would be to
21 take those first two days, Monday and
22 Tuesday --

23 CHAIRMAN FEINBERG: Full.

24 MR. VAN TOL: -- Thanksgiving week,
25 cognizant that that may speed up things.

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2 CHAIRMAN FEINBERG: It's the following
3 week. Yes, it may very well speed up
4 things. We might do it in Plymouth,
5 Massachusetts.

6 MR. VAN TOL: Or we could go to
7 Bermuda.

8 CHAIRMAN FEINBERG: Are you available?

9 MR. CRAIG: What.

10 CHAIRMAN FEINBERG: Monday and
11 Tuesday.

12 MR. JENTES: No, I said 20, 21st and
13 22nd. Again, the alternative is November 6,
14 7 and 8.

15 MR. SILLS: November 6th, Mr. Jentes,
16 is the hearing date set in a parallel
17 arbitration between Force, another
18 shareholders' agreement; that is in Geneva.

19 CHAIRMAN FEINBERG: Let's reserve
20 Monday and Tuesday, I think it's November 20
21 and 21, for two days of hearing with the
22 idea that we will conclude Tuesday, even if
23 we have to go later, because Wednesday out
24 of the question. And let's plan on that.

25 Let's plan on any discovery related to

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2 that two-day hearing to be worked out
3 consensually by the parties to come back to
4 the chair to resolve any discovery disputes
5 which the chair can then raise with his
6 fellow panelists.

7 And does everybody understand the
8 accelerated findings of fact, conclusions of
9 law schedule by the close of business next
10 Tuesday, one week from today, solely on the
11 issue of jurisdiction to arbitrate?

12 MR. VAN TOL: Yes.

13 MR. SILLS: And just two clarifying
14 questions.

15 Mr. Feinberg, I take it that there is
16 no schedule now in place for proposed
17 findings and conclusions on the question of
18 contract validity as opposed to
19 arbitrability?

20 CHAIRMAN FEINBERG: My answer to that
21 is since we have worked out a hearing in
22 November. Hopefully you guys can get
23 together with each other and decide in
24 conjunction with that hearing when you might
25 get us something. I think probably --

<p style="text-align: right;">Page 90</p> <p>1 Proceedings 2 MR. JENTES: Let me try to help a 3 little bit. 4 What I envision the panel would enter, 5 after you submit whatever you want to submit 6 a week from now, would be either a final 7 award, which will essentially grant the 8 Motion to Dismiss, or it will be a partial 9 final award, which will essentially deny the 10 Motion to Dismiss and set the matter forward 11 for a hearing on the merits and the ultimate 12 decision on a final award.</p> <p>13 MR. SILLS: I guess my question is, in 14 thinking back to the argument that was being 15 made by Storm, does the panel want to hear 16 on the merits, for example, this claim that 17 the Alperin order somehow governs here on 18 the substantive question of contract 19 validity? Or are we to address simply the 20 question of whether or not panel has 21 jurisdiction to resolve questions, including 22 the applicability of this Ukrainian order?</p> <p>23 MR. CRAIG: The latter. 24 CHAIRMAN FEINBERG: The latter. 25 MR. SILLS: So it's purely a</p>	<p style="text-align: right;">Page 91</p> <p>1 Proceedings 2 jurisdictional submission. 3 The other question is purely 4 logistical. Given that we have now fixed 5 this November 20 hearing, is it appropriate 6 now to fix at least a preliminary schedule 7 for the submission of trial briefs and 8 witness statements?</p> <p>9 MR. CRAIG: I was going to ask that 10 same question.</p> <p>11 CHAIRMAN FEINBERG: Although I had 12 simply assumed that is precisely what you 13 guys will work out, and unless we, unless we 14 need that resolved -- I mean, based on the 15 cooperative tone of your conversations, 16 that's precisely what we are hoping you will 17 work out, all of the pretrial dates leading 18 up to the 20th.</p> <p>19 MR. CRAIG: I would only suggest that 20 you don't wait until November 19th to 21 provide whatever your work product is on 22 this.</p> <p>23 CHAIRMAN FEINBERG: And I guess, in 24 response to Bob's question, I guess proposed 25 findings as to issues unrelated to a week</p>
<p style="text-align: right;">Page 92</p> <p>1 Proceedings 2 from today on jurisdiction, I guess are moot 3 now, aren't they? 4 I mean assume, big assumption that we 5 decide that we have jurisdiction, are those 6 proposed findings, aren't those then going 7 to be submitted after the hearing rather 8 than before?</p> <p>9 MR. SILLS: So, that the November 20 10 hearing will consider this claim that the 11 contract isn't, doesn't exist?</p> <p>12 CHAIRMAN FEINBERG: I guess. And 13 that's an interesting question that we defer 14 to you guys on what remains to be said that 15 hasn't been said ad nauseum, frankly. But 16 there may be additional evidence, 17 depositions, documentation, whatever that 18 you may want to raise.</p> <p>19 MR. SILLS: I guess on that one, I 20 thought the parties had agreed that, at 21 least on that issue, the record was closed 22 and we were now going to get to put a 23 schedule in place on the merits. I think 24 given the November 20 day, I mean we are 25 certainly prepared to agree that on the</p>	<p style="text-align: right;">Page 93</p> <p>1 Proceedings 2 question of contractual validity and 3 existence, that the record is closed and 4 that this hearing is on other issues, but 5 that there will be a single award. In 6 effect, an omnibus ruling in effect at the 7 end of that. I would hope that Storm would 8 agree with that as well.</p> <p>9 MR. VAN TOL: That's my understanding 10 of what we are doing. We are going to 11 jurisdictional issues first and then to the 12 extent there are issues of contract validity 13 that we want to make, that will be part of 14 the final award by the panel.</p> <p>15 MR. SILLS: But my question is 16 different, Mr. Chairman.</p> <p>17 There are other issues that, again, 18 assuming that we prevail on the 19 jurisdictional issue, for example, should 20 Storm come to shareholders' meeting, should 21 they, what is the appropriate remedy if they 22 are competing in violation of the 23 non-compete clause? Those haven't been 24 addressed at all yet. But our view is that 25 there has been enough ink spilled on the</p>

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 2 question of whether or not the shareholders'
 3 agreement is a valid, subsisting,
 4 enforceable contract. That doesn't resolve
 5 the question of how it gets enforced, but it
 6 seems to me, in the interest of moving this
 7 along and not doing this for a fourth time,
 8 we should agree now that on those questions
 9 the record is closed and that evidentiary
 10 submission, if any, and the argument, which
 11 I think will take place on the 20th, is
 12 addressed to these other issues and that we
 13 don't have to do this one more time.

14 MR. VAN TOL: Well now I'm confused.
 15 Because I thought what we were going to do,
 16 what the tribunal was suggesting was that
 17 these findings of fact will go to the
 18 primary argument we have made, which that is
 19 there is no jurisdiction. The tribunal has
 20 no jurisdiction, that it should be decided
 21 by a court.

22 Our subsidiary argument is, even if
 23 you find you do have jurisdiction, you
 24 should follow the findings of the Ukrainian
 25 courts and find that no contracts exists. I

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 2 would like to raise that at the hearing,
 3 finally. To the extent that there is any
 4 funeral evidence limited to those points,
 5 that ought to come in.

6 CHAIRMAN FEINBERG: So what you are
 7 saying is you reserve the right, on
 8 November 20, assuming we rule motion denied,
 9 you want the reserve the right on the 20th
 10 to offer evidence, not only on other issues
 11 that Bob has just suggested -- remedy, for
 12 example -- but you want to keep the record
 13 open so that you can offer additional
 14 evidence on the question of the validity
 15 of -- or invalidity of the underlying
 16 shareholder agreement.

17 MR. VAN TOL: That's correct.

18 MR. SILLS: In that case, I am going
 19 to make an oral motion. I think there are
 20 two solutions. It's their motion, it's
 21 their burden, I don't -- let me start again.

22 I think the record should be closed on
 23 this point. If they, as one of the letters
 24 we saw said, work on Mr. Nilov and he now
 25 has a change of heart, and he would now like

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 2 to come to New York and testify, it seems me
 3 it's too late. We have been doing this for
 4 three months and it's their motion. They
 5 have had three shots at this. I think the
 6 proposed findings and conclusions that we
 7 will be submitting with respect to this
 8 November 20 hearing should include the
 9 question of contract validity.

10 I assume that the award that will be
 11 rendered after the November 20 hearing will
 12 address the question of whether there is a
 13 contract, which seems to me to be a
 14 necessary predicate to whether or not they
 15 are breaching the contract. And they are
 16 fully entitled to say whatever they want in
 17 their proposed findings or conclusions or
 18 any other briefing that the panel orders.
 19 But we do move that, on the question of
 20 contract validity and existence, that the
 21 panel declare, as it has the power to do
 22 under the Uncitral rules, that on that issue
 23 the evidentiary record is closed and that we
 24 are not going to be surprised by a new
 25 affidavit from Mr. Khudyakov or Mr. Nilov

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 2 showing up or yet another Ukrainian expert.

3 The claim is morphed enough. I think
 4 it's time to close the record on that issue
 5 and we would respectfully ask the panel to
 6 do so.

7 MR. VAN TOL: Well, I would oppose. I
 8 don't see any prejudice to Telenor Mobile.
 9 I'm not suggesting bringing in a witness on
 10 the 20th that they have had no notice of. I
 11 am not suggesting trial by surprise. I will
 12 make evidence available, just as Telenor
 13 Mobile has made evidence available in these
 14 hearings. I'm not suggesting another
 15 interim hearing. I'm simply saying that if
 16 more evidence comes to light, it should be
 17 before the tribunal on the 20th and 21st.

18 And I think under the FAA at least,
 19 the tribunal has an obligation to entertain
 20 evidence going to the ultimate issues.

21 CHAIRMAN FEINBERG: All right. What
 22 else?

23 MR. VAN TOL: I do -- I'm sorry to do
 24 this, but I have one clarification on what I
 25 said earlier, and it's really to make sure

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 2 that I parse this carefully, because I
 3 noticed the tribunal quite accurately pays
 4 attention to what we say and how we say it.
 5 Earlier I said and I stand by it that
 6 I have no indication that Mr. Nilov lacked
 7 authority under the charter to enter into a
 8 separate arbitration agreement. What I
 9 would remind the tribunal, and this is
 10 already in the record so it's not new
 11 evidence, is that in both the April 25th
 12 decision and in the May 25th decision, the
 13 trial court in the first instance, and the
 14 appellate court, found that the
 15 shareholders' agreement, quote, should be
 16 rendered null and void in full, including
 17 the arbitration clause, end quote.

18 So, and then in the next paragraph it
 19 cites Article 216 of the Civil Code of the
 20 Ukraine, which essentially says if a
 21 transaction is invalid and it wipes out the
 22 whole agreement, the parties can't agree to
 23 resuscitate it.

24 So, we will be making the argument
 25 that under Ukrainian law what Mr. Nilov did

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 2 and what the courts found, the fact that he
 3 didn't have authority to enter into the
 4 agreement, notwithstanding the severability
 5 clause, wipes out the whole agreement. Not
 6 under the charter, but Ukrainian law,
 7 because it's in the two court findings. I
 8 have to make my record on that. That is
 9 part of the Court's finding. It went out of
 10 its way to include the arbitration clause.

11 CHAIRMAN FEINBERG: Anything else? I
 12 think before we, before everybody departs
 13 just to be safe, I think the panel would
 14 like another 15 minutes.

15 There is lunch anyway, I think, being
 16 served. I think that the panel would like
 17 to convene one more time.

18 MR. JENTES: Could I ask one question?
 19 And that is: Is Ukraine a -- I don't know
 20 whether they are a signatory the New York
 21 convention. Did they participate in
 22 Uncitral; in other words, are the Uncitral
 23 rules valid and enforceable in Ukraine?

24 MR. VAN TOL: I don't know. Let me
 25 confer with my colleagues.

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 2 I don't know. We would have to find
 3 out the answer for you.
 4 CHAIRMAN FEINBERG: Do you know?
 5 MR. SILLS: I do, Mr. Chairman.
 6 Ukraine has adopted the model law. I mean,
 7 they wouldn't adopt the rules, themselves.

8 MR. JENTES: No.

9 MR. SILLS: There is no jurisdiction
 10 that has done that. But Ukraine is a party
 11 to the New York convention. It's a party to
 12 the inter-European convention. And I am
 13 informed by European counsel that they have
 14 adopted, with slight variations that I don't
 15 think are relevant, the Uncitral model rule.

16 So that as a result, although it's, of
 17 course, the contract specifies New York law
 18 not Ukrainian law, but to the extent
 19 Ukrainian law were applicable on its face,
 20 Ukraine follows the conventional
 21 international arbitration regime.

22 CHAIRMAN FEINBERG: Before we have
 23 lunch, let me just confer for a second with
 24 my fellow arbitrators.

25 (Pause.)

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 2 CHAIRMAN FEINBERG: I just said a few
 3 minutes ago we would like to confer, we just
 4 did, and Bob's oral motion is denied.

5 If the parties wish to supplement that
 6 which has already been admitted into
 7 evidence, they have that option.

8 We are not seeking to rehash all of
 9 this, but if there is additional evidence
 10 beyond that which has already been admitted,
 11 we leave open that avenue if either party
 12 wishes to proceed.

13 Go ahead.

14 MR. CRAIG: Additional means not
 15 duplicative and not repetitive. Additional
 16 new evidence.

17 CHAIRMAN FEINBERG: Correct.

18 MR. JENTES: I would only emphasize
 19 evidence, not just argument or legal
 20 authority or anything like that.

21 MR. SILLS: And I take it, as the
 22 panel ruled at the first argument, the first
 23 hearing on this, that, Mr. Chairman, the
 24 panel will entertain a motion to subpoena
 25 any witness who provides an affidavit and

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